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No. 86-1577

In the Supreme Court of the United States

OCTOBER TERM, 1986

FERNANDO FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish that petitioner participated and conspired to participate in a "pattern of racketeering activity" within the meaning of 18 U.S.C. 1961(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 797 F.2d 943.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A petition for rehearing was denied on January 8, 1987. The petition for a writ of certiorari was filed on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count Two); conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d) (Count One); conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count Four); and conspiracy to possess marijuana

with intent to distribute it, in violation of 21 U.S.C. 846 (Count Five). He was sentenced to concurrent terms of 12 years' imprisonment on the RICO counts, and to concurrent five-year terms of probation on the drug conspiracy counts, to be served after completion of the prison sentence. On appeal, the court of appeals affirmed petitioner's RICO convictions but reversed his drug conspiracy convictions (Pet. App. A1-A26).

1. Most of the relevant evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A8-A11, A13-A14, A17-A19). It showed that Jose Manuel Fernandez-Toledo (also known as Cheo Fernandez) headed a marijuana smuggling and distribution operation. An informant placed in that organization recorded conversations in Cheo's office. The recorded conversations revealed that Cheo imported marijuana on a daily basis and stored it in "stash houses" pending distribution. The recordings also revealed that Cheo was becoming frustrated by the government's success in seizing shiploads of his marijuana and arresting the persons he had hired to unload the drugs. *Id.* at A13.

On November 5, 1983, Cheo and petitioner had a long conversation that centered on the importation of marijuana. A tape recording of that conversation, which took place in Cheo's office, was introduced at trial. It formed the main proof against petitioner.[1]

In the course of the recorded conversation, Cheo expressed his desire to import marijuana by air as well as by sea, and he asked petitioner's help in obtaining a DC-3

[1] Petitioner was identified as the person speaking with Cheo by video surveillance tapes showing him entering Cheo's office, by physical surveillance testimony, by voice identification, and by a comparision of the family relationships he discussed in the course of the tape-recorded conversation with the personal history information he gave at the time of his arrest. See 2 Trial Tr. 64-67, 99-102, 110; GX 105.

airplane capable of carrying 4,500 pounds of marijuana. Petitioner provided Cheo with the name of a "very bold" pilot. Pet. App. A9-A10. Cheo also told petitioner that, in addition to the fact that several boats loaded with marijuana had been seized, some of the other boats needed substantial repairs (GX 105, at 27). Cheo asked petitioner to examine one of the boats at the Manola Marina. Cheo warned petitioner, however, to be sure to wear a disguise when he did so (*id.* at 27-28).

The discussion then turned to an earlier attempt to import marijuana, which had been mishandled by other members of the enterprise (Pet. App. A13). Petitioner and Cheo discussed two brothers who had "screwed up" a load of marijuana that had been destined for a "guy from New York" (GX 105, at 15, 19, 23). Petitioner told Cheo that the brothers had to make good on the money owed for the marijuana (*id.* at 19). Petitioner stated that he had arranged to have the brothers "fucked really good" when they arrived in prison (*ibid.*), but that in the meantime the "creditors" wanted the money that was owed to them paid "right away" (*id.* at 14). Petitioner told Cheo that "old man Guerra," who had taken over the account, was a "real son of a bitch," and Cheo agreed that they had to pay Guerra the money (*id.* at 15). Later, again referring to the money owed to Guerra, petitioner stated: "Don't talk to me about money. Don't talk to me about money until a trip comes in and I can get something" (*id.* at 29).

In the course of the same conversation, petitioner told Cheo that he had trouble sleeping because of Rogelio, an associate who the two men believed had stolen marijuana from them (Pet. App. A17-A19). Petitioner told Cheo that Rogelio clearly was the one who had stolen the marijuana because Rogelio had readied the truck and knew about the stash house (GX 105, at 39). Petitioner proposed to lure

Rogelio to "the ranch"[2] and there to say to him: "Look brother, you know how it is, you were the one who stole * * * the material, the grass, where is your buddy and if you don't talk then you'll go under, now look how it is. You're going to talk and you're also going to give money." Pet. App. A17 (quoting from GX 105, at 36).

In response to petitioner's plan, Cheo stated: "The problem with that is, if the guy is grabbed * * * [t]hat guy can't be let [go] anymore" (GX 105, at 36-37). Cheo added, "He has to die, even if he talks. * * * Or doesn't talk." Petitioner agreed that Rogelio had to be killed (*id.* at 37). Cheo then said that after they killed Rogelio, they should set fire to his corpse so that no one would find it and start an investigation. Again, petitioner agreed. Pet. App. A18.

Cheo rejected petitioner's plan for luring Rogelio to the ranch and instead proposed that they "take [him] in front of people, and get a hold of him, tie him, pick him up and take him away" (Pet. App. A18). Petitioner replied, "Well man, there's no other alternative, so you know. There's no other alternative. Just that one." Petitioner then stated that he would do the actual killing himself. Petitioner said, "Cheo, if he has to be hit, he'll be hit, I'll hit him myself. (Pause) But I need a place to put him." Cheo responded, "Yes that can be done, it can be done." Pet. App. A19. Petitioner told Cheo that the place must impress Rogelio with the seriousness of the situation so that he would "talk about everything" (*ibid.*). Petitioner then explained that he would say to Rogelio: "Look you're imprisoned here, you're imprisoned and you better talk about everything, everything, if you want to save yourself. * * * And if he doesn't talk, or speaks, or if he spits everything out and declares everything, hit him, hit him and bury him." Petitioner explained that it couldn't be any other way because

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[2] Petitioner did not own a ranch, but he knew that Cheo owned one farm and had access to another (Pet. App. A17).

petitioner had to preserve his reputation as "the best person here moving material [*i.e.*, marijuana]." GX 105, at 39-40.

During the same conversation, Cheo also asked petitioner for assistance in providing papers for an armored car that Cheo had sent to his Colombian suppliers in payment for marijuana (GX 105, at 29-31, 33). Petitioner advised Cheo to report the car stolen (*id.* at 32, 42-43).

In addition to the tape-recorded conversation, Cheo's 1983 "yearbook" was introduced into evidence. The notations in the "yearbook" indicated that Cheo had paid petitioner a share of the profits from previous drug deals—$12,000 in February 1983 and another $10,000 in August of that year (GX 190).

2. The court of appeals reversed petitioner's drug conspiracy convictions but affirmed his RICO convictions (Pet. App. A1-A26). With regard to the drug conspiracy convictions, the court found (Pet. App. A16) that the evidence was insufficient. The court explained (*id.* at A10, A16) that petitioner's providing Cheo with the name of a pilot who could transport "a hypothetical load of marijuana" did not constitute an "agreement" to import marijuana, and that petitioner's "vague" discussions with Cheo concerning previous marijuana ventures "cannot be considered evidence upon which a conviction for conspiracy to possess marijuana may be upheld" (Pet. App. A10). The court therefore reversed petitioner's convictions on Counts Four and Five (*id.* at A16).

With regard to the RICO counts, the court found the evidence to be sufficient. The court noted (Pet. App. A20) that "the * * * conversation between Cheo and [petitioner] clearly demonstrates an agreement by [petitioner] to participate in the affairs of Cheo's enterprise." Although the court's reversal of petitioner's conviction for the two marijuana conspiracies eliminated those conspiracies (which were combined into a single predicate act of racketeering)

as support for the RICO convictions, the court found the proof sufficient to sustain the two remaining predicate acts charged in the indictment arising out of the plan to kidnap and then to murder Rogelio.[3] "[Petitioner] knowingly agreed to further the objective of the enterprise (narcotics smuggling) by agreeing to kidnap and murder an individual who had stolen from the enterprise and whose conduct, if allowed to go unpunished, would compromise the integrity and reputation of the enterprise" (*ibid.*).

The court rejected petitioner's argument that, since "the planned confinement of Rogelio merely would have been incidental to the murder," the conspiracies to kidnap and murder Rogelio constituted only one crime (Pet. App. A21). The court noted that under Florida law the proposed kidnapping of Rogelio would be a crime separate and distinct from his murder because it served separate purposes (*id.* at A21-A22):

> Both Cheo and [petitioner] agreed that abducting Rogelio and confining him at the farm would serve three purposes, which were independent of the act of killing Rogelio. The abduction and confinement would allow them to obtain information from Rogelio, would serve as an example to the community, and would lessen the detection of the murder.

Accordingly, the court concluded (Pet. App. A22), "the evidence demonstrates two predicate crimes chargeable

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[3] In Count One, which charged a conspiracy to violate the RICO statute, the predicate acts of racketeering that petitioner was alleged to have conspired to commit were the kidnapping of Rogelio, the murder of Rogelio, and the importation and possession of marijuana with the intent to distribute it. In Count Two, which charged a substantive violation of the RICO statute, the predicate acts of racketeering which petitioner was alleged to have committed were the conspiracy to kidnap Rogelio, the conspiracy to murder Rogelio, and the conspiracy to import and to possess marijuana with the intent to distribute it. Conspiracies to commit the offenses listed in 18 U.S.C. (Supp. III) 1961(1) are "acts involving" those offenses and therefore can serve as predicate

under Florida law, constituting the requisite pattern of racketeering activity."

The court also rejected petitioner's argument that, even if there were two separate crimes, the two predicate acts of racketeering did not constitute a "pattern of racketeering" within the meaning of the RICO statute, 18 U.S.C. 1961(5). The court of appeals noted this Court's suggestion in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), that "two isolated acts of racketeering activity do not constitute a pattern." The court of appeals concluded, however, that the two predicates charged in this case were not isolated acts at all, but plainly constituted a pattern of racketeering activity when viewed in the context of the much broader pattern of racketeering activity of which the proposed kidnapping and murder were a part. As the court observed, "[t]he conspiracies to kidnap and murder Rogelio were closely related * * * to the ongoing objective of narcotics smuggling" (Pet. App. A22 n.5).

ARGUMENT

1. Petitioner argues (Pet. 13) that the scheme to kidnap and then to kill Rogelio constituted only a single predicate act of racketeering. Petitioner, however, ignores the fact that the predicate acts of racketeering at issue here are separately defined by Florida state law. The RICO statute defines "racketeering activity" as including, inter alia, "any act or threat involving murder, kidnapping [or other listed crime] which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. (Supp. III) 1961(1). Thus, in determining whether one or two predicate acts were involved, the court of appeals properly looked to Florida law. And Florida law clearly indicates that, under the circumstances of this case, the kidnapping and murder of Rogelio would have constituted two distinct crimes. See Pet. App. A21-A22.

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acts in a substantive RICO count. See, *e.g.*, *United States* v. *Weisman*, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

For purposes of Count One, which charged a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, this analysis indicates that petitioner conspired to commit two separate predicate acts: the kidnapping of Rogelio and the murder of Rogelio. As we have noted, to prove a RICO conspiracy the government need only show that the defendant agreed to commit two predicate acts that constitute a pattern of racketeering activity. Since petitioner agreed both to kidnap Rogelio and to murder him, and since kidnapping and murder are separate crimes under Florida law, it follows that petitioner agreed to commit two predicate acts of racketeering.[4]

Even if the Court were to conclude that the kidnapping and murder of the same individual could not constitute two separate predicate acts of racketeering (and, hence, that an agreement to commit those two acts would not be sufficient to establish RICO conspiracy liability), the judgment below would still be correct. In our view, the court of appeals was wrong in finding that the evidence was insufficient to support the predicate act of racketeering that was based on the marijuana conspiracies charged in Counts Four and Five. Hence, on a proper analysis of the evidence, that additional predicate act would be available to support the judgment below. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)

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[4] With respect to Count Two, the substantive RICO violation, the issue is less clear. To prove a substantive RICO violation, one must show that the defendant actually committed two predicate acts of racketeering. As noted, conspiracies may serve as predicate acts in a substantive RICO conviction. But it is not clear whether conspiracy to kidnap and conspiracy to murder would, in the circumstances of this case, be chargeable as separate crimes under Florida law. The court of appeals did not address that question. In any event, this question of Florida law does not merit the Court's attention and, since petitioner's terms of imprisonment on Counts One and Two were made to run concurrently, the issue has little practical importance in this case.

(respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or the Court of Appeals"); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382-387 (6th ed. 1986).

The evidence presented by the government showed not just that petitioner was a member of Cheo's marijuana organization, but also that he was a trusted and valuable lieutenant who took part in the organization's drug distribution activities. During a single extended conversation, the two men discussed (1) Cheo's decision to switch his method of importation from the sea to the air; (2) a marijuana venture that had become "screwed up" and for which the organization owed money to "creditors"; (3) the necessity of kidnapping and killing Rogelio because he had stolen marijuana from them; and (4) the best way of hiding the fact that Cheo had exchanged his armored car for a shipment of marijuana.[5]

Petitioner's participation in the conspiracies to import and to possess marijuana with intent to distribute it constituted the only plausible explanation for his concern about the debt to the "creditors" of the "screwed up" drug deal; for his arranging to have the two brothers who had "screwed up" the transaction punished in jail; for his professed inability to sleep because of problems with Rogelio; or for his initiating the discussion about the need to punish Rogelio and his agreeing to kidnap and murder him. Indeed, if petitioner had said no more to Cheo than that

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[5] Although the court of appeals' opinion is unclear on the point, it appears that the court may have considered portions of the November 5, 1983, conversation between Cheo and petitioner to be hearsay. See Pet. App. A10-A11. In fact, the conversation was not hearsay at all. It consisted entirely of admissions and adoptive admissions by petitioner. Accordingly, none of the evidence that tied petitioner to the marijuana conspiracies was excludable as hearsay.

Cheo should not talk to him about money "until a trip comes in and I can get something"—an implicit reference to the fact that the government was successfully intercepting Cheo's marijuana shipments—petitioner's participation in Cheo's drug-trafficking operation would have been clear. In light of all this evidence—not to mention Cheo's two payments to petitioner totaling $22,000—the court of appeals clearly erred in refusing to consider the marijuana conspiracies as constituting a separate predicate act of racketeering against petitioner. Thus, even if petitioner were correct that the plan to kidnap and to murder Rogelio gave rise to only one predicate act of racketeering, his RICO conviction would still stand.

2. Relying on this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co., supra*, petitioner contends (Pet. 7-14) that, even if the Rogelio scheme counted as two predicate acts, the acts did not constitute a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5). In fact, however, there was substantial evidence in this case that established a pattern of racketeering of which the Rogelio scheme was a part. While in some cases, the commission of two predicate acts may not be sufficient to show a pattern of racketeering, there was ample proof in this case that the two predicate acts relating to Rogelio were not isolated criminal acts, but were part of a pattern of criminal activity designed to further the affairs of the narcotics enterprise charged in the indictment.

A pattern of racketeering activity, as defined in 18 U.S.C. 1961(5), requires at least two acts of racketeering activity committed during a single ten-year period. In *Sedima,* the Court observed (473 U.S. at 496 n.14) that while two acts of racketeering are necessary to establish a pattern under RICO, they "may not be sufficient." The Court explained that "two isolated acts of racketeering activity do not constitute a pattern;" rather, a pattern re-

quires " '*continuity plus relationship*' " (quoting S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis in original)). The Court went on to quote (473 U.S. 496 n.14) with approval the broad definition of "pattern" in the dangerous special offender statute, 18 U.S.C. 3575(e), as " 'embrac[ing] criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' "

Here, the court of appeals specifically found that petitioner's acts were not isolated acts of racketeering, but that they established a pattern by displaying the "continuity and relationship" referred to in *Sedima* (Pet. App. A22 n.5). The court explained (*ibid.*) that "[petitioner's] acts were not isolated. The conspiracies to kidnap and murder Rogelio were closely related * * * to the ongoing objectives of narcotics smuggling." As the court of appeals further observed, "[p]etitioner knowingly agreed to further the objective of the enterprise (narcotics smuggling) by agreeing to kidnap and murder an individual whose conduct, if allowed to go unpunished, would compromise the integrity and reputation of the enterprise" (Pet. App. A20). Contrary to petitioner's contention, therefore, the decision of the court of appeals is not inconsistent with this Court's decision in *Sedima* or any of the court of appeals cases following the *Sedima* case.[6]

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[6] If the court of appeals had considered the marijuana conspiracies as an additional predicate act against petitioner, as we submit it should have done, the pattern of racketeering activity established by the predicate acts would have been even clearer. The evidence at trial showed that the proposed kidnapping and murder of Rogelio were among petitioner's ongoing responsibilities in assisting the drug smuggling enterprise in which he was involved as a conspirator.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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